NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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February 19, 2002

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Communication; In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GEN Docket No. 00-185

Dear Mr. Caton:

The National Cable & Telecommunications Association ("NCTA") submits this ex parte in response to the ex parte letters filed in the above-referenced docket by the National Association of Telecommunications Advisors and Officers ("NATOA") on January 10, 2002 and by the Local and State Government Advisory Committee ("LSGAC") on February 5, 2002.

NCTA respectfully but strongly disagrees with NATOA's assertion that "[i]nformation services offered by cable operators are cable systems are still subject to Title VI jurisdiction and regulation." To the contrary, if the Commission finds that cable modem service is an information service, there is no legal basis or policy justification for subjecting it to local regulation, including franchise fees.

NATOA's ex parte assertions confirm the strong need for explicit direction from the Commission, if it decides to classify cable modem service as an information service, regarding the proper scope of local regulation. In the absence of such guidance, some local franchising authorities (LFAs) may demand a second franchise from cable operators to provide cable modem service or seek franchise fees that local governments cannot and do not impose on other providers of Internet access. A five-percent fee on cable modem service, for instance, would raise the price of that offering by $2.50 per month (assuming an average $50 monthly charge), burdening cable subscribers and placing cable operators at a competitive disadvantage vis-à-vis other ISPs, including local telephone companies. A requirement that a cable operator obtain an additional franchise would likewise deter broadband deployment. It runs contrary to the Commission's goal of encouraging such deployment and the Congressionally-mandated policy of preserving the free market for the Internet "unfettered by . . . regulation."

To these ends, NCTA respectfully urges the Commission to address the following points and provide guidance to local governments, the public, and affected companies[1/] in its order concluding this proceeding.

Cable Modem Service Classification. If the Commission decides that cable modem service is an "information service," then it should clarify in particular that it is (1) an interstate (2) information service (3) provided over a cable system. 47 U.S.C. §§ 153(20), 522(7). Transmission of cable modem service via a cable system is the "via telecommunications" component of the service. *Cf. id.*

No Forced Access Requirement. In the order concluding the NOI, the Commission should specifically hold that cable modem service is not a "telecommunications service," nor does it include a telecommunications service, and should clarify that as a result, cable operators are not subject to "forced access" requirements. If the Commission decides to issue a further NPRM on forced access rather than resolving the issue in the NOI ruling, it should specifically hold that there is currently no forced access requirement at any level of government. Cable modem service is interstate in nature, and the FCC should indicate clearly that it is occupying the regulatory field.

Failure to provide a clear answer to this central question will cause continued uncertainty in the marketplace, discouraging further investment in and expansion of cable modem service. Further, it will leave the cable industry vulnerable to numerous lawsuits that would inevitably result from the lack of clarity. In the absence of a national policy, three Federal courts of appeal have taken three different approaches to cable modem service. More recently, the lack of a clear Federal policy on forced access issue has already produced a situation in California in which a District Court has interpreted the Ninth Circuit's *Portland* decision to hold that cable modem service includes a telecommunications service component.[2/] This decision, and others that may arise if the Commission delays, compromise the Commission's ability to set a uniform national policy, one of its stated goals in instituting the proceeding.[3/]

Nationwide Applicability of Decision. The Commission should state explicitly that the NOI order and any proceedings flowing from it apply nationwide. In order to address the District Court and Court of Appeals decisions in the Ninth Circuit suggesting that cable modem

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[1/] *Cf. TCI Cablevision of Oakland County, Inc; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21440, ¶ 102 (1997) ("[a]lthough we decline . . . to issue a declaratory ruling . . . , we take this opportunity to address generally some issues related to section 253").

[2/] *See GTE.NET LLC d/b/a/ Verizon Internet Solutions v. Cox Communications, Inc.*, No. 00-CV-2289-J (S.D. Ca.). The court has stayed the proceedings temporarily on the ground that the FCC has primary jurisdiction over the issue of whether cable modem service providers should be subject to access obligations. *See id.*, Order Granting Motion to Stay and Denying Motion to Dismiss (Jan. 29, 2002).

[3/] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185, *Notice of Inquiry* ¶ 2 ("We seek to instill a measure of regulatory stability in the market to encourage investment in all types of high-speed networks and innovation in high-speed services. It is particularly important to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners.").

service may have a telecommunications service component, and to ensure that there is a coherent uniform nationwide policy on cable modem service, the Commission should explicitly forbear from applying Title II access-like obligations on cable operators. This forbearance is necessitated only because of the suggestion in the Ninth Circuit decisions; the Commission should make clear that as a matter of national policy cable modem service is an information service and *not* a telecommunications service but an information service.

No Retroactive Refund Liability. The Commission should make clear that there is there is no retroactive refund liability for previously-collected franchise fees on cable modem service. Retroactive liability would be unjust in light of the uncertainty over regulatory classification that prevailed prior to any FCC decision and the good faith belief of cable operators, uncontradicted by the Commission, that the service should be classified as a cable service. It would also be unfair to LFAs that acted in good faith to have to return fees collected under the previous uncertain conditions.

No Additional Franchise Going Forward. Cable modem service puts no additional burden on rights of way. Accordingly, the classification of cable modem service as an information service should not trigger any requirements for cable operators to obtain a separate franchise or other agreement from State or local governments to provide cable modem service over the cable system, or subject such service to other State or local cable service regulation. *See* 47 U.S.C. § 541(a)(2) ("*any* franchise shall be construed to authorize the construction of a cable system over public rights-of-way," without limitation on the services to be provided) (emphasis added); *id.* § 544(a) (franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]"); *id.* § 544(b)(1) (franchising authority may not "establish requirements for . . . information services"). *See also* H. REP. 98-934, 98th Cong., 2d Sess. 44 (1984) ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose. . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.").

That no additional franchise should be required is also supported by the Commission's previous determinations that a franchising authority does not have authority to manage use of the public rights-of-way by a cable system "separate and distinct from its cable franchising authority;" that LFA authority to manage the public rights-of-way may not be exercised in a manner that is expressly prohibited under Title VI; and that a municipality's authority to franchise and regulate cable system construction and operation through the franchise process is subject to, and specifically limited by, Title VI and section 621(a)(2) in particular.[4/]

[4/] *See TCI Cablevision of Oakland County, Inc; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, Order on Reconsideration, 13 FCC Rcd 16400, ¶ 39 (1998); *see also id.* ¶ 40 (internal citations omitted) (noting that the "legislative history of the 1984 Cable Act confirms that the purpose of Title VI was to establish a national policy clarifying the then-current system of local, state and Federal regulation of cable television . . . while defining and limiting the authority that a franchising authority may exercise through the franchise process;" that "[t]he 1984 Act 'establishes the authority of local governments to regulate cable television through the franchise process'"; and that "[t]he House Report clearly states, with respect to section 621, that the provision 'grants a franchising authority the authority to award one or more franchises within its

Requiring a cable operator to obtain a second franchise (or otherwise submit to State or local regulation of cable modem service, discussed below) also would contradict the federal policy to "promote the continued development of the Internet and other interactive computer services," and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by . . . State regulation."[5/] Further, it would hamper the Commission's efforts to promote widespread deployment of broadband service by placing cable operators at a competitive disadvantage vis-à-vis other Internet service providers, which are not subject to local franchising or service requirements. Even local exchange carriers, which, like cable operators, utilize public rights-of-way, are not required to obtain an additional local franchise to offer broadband Internet access via DSL. Clarifying that a second franchise is not required is also consistent with Congress's determination in Section 706 of the Act to encourage broadband deployment, a viewpoint most recently emphasized in the U.S. Supreme Court's *Gulf Power* decision.[6/]

No Local Regulation of Interstate Information Services Permitted. The imposition of State or local conditions or requirements on the provision of cable modem service would be inconsistent with the interstate nature of cable modem service.[7/] As an interstate -- indeed, a global -- medium, cable modem service is appropriately regulated, if at all, at the federal, not the State or local, level.[8/] Congress has long reserved jurisdiction over interstate non-cable services offered by cable operators to the federal government. *See* 47 U.S.C. § 541(d)(1) (authorizing States to require informational tariffs for any "intrastate communications service provided by a cable system") (emphasis added); *see also* H. REP. 98-934, 98th Cong., 2d Sess. 63 (1984) ("states would not have the authority to require cable operators to file informational tariffs for services (such as enhanced services and interconnection with interstate carriers) which are interstate in character").

No Additional Fee Going Forward. The decision to classify cable modem service as an information service should not result in cable operators owing any fees for use of the public rights-of-way beyond the franchise fee assessed on cable service revenues pursuant to section 622 of the Cable Act, 47 U.S.C. § 542. Cable modem service is provided over a cable system, and the offering of this service places no additional burden on the rights-of-way. *Cf.* 47 U.S.C. §

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jurisdiction. This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems.'").

5/ 47 U.S.C. §, § 230(b)(1), (2).

6/ *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 789 (2002) (construing statute in manner that discourages cable operator provision of non-video programming services "would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment'").

7/ *See Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 52 (2001), *citing Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4 (1986) (Internet access is an interstate service).

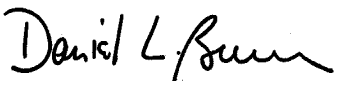
8/ *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, 541 n.34 (1981) (Commission exercised its exclusive jurisdiction over "interstate communication by wire or radio" to preempt any efforts by states to apply common carrier or utility regulations to firms that provide interstate information services).

541(a)(2) (cable franchise "shall be construed" to authorize the construction of a cable system over the public rights-of-way). Like the imposition of a new franchise on cable modem service, moreover, a separate fee would serve as a disincentive to the deployment of cable modem service and would place cable modem service providers at a competitive disadvantage vis-à-vis their competitors, none of whom pay a local franchise fee, in the provision of high-speed Internet access service. As noted, franchise fees on cable modem service would result in an additional subscriber fee of approximately $2.50 per month, an additional charge that would unfairly burden cable subscribers and create substantial marketplace disparity among comparable service offerings.

No Additional Regulatory Requirements. Classifying cable modem service as an information service should not result in the imposition of any regulatory burdens associated with the provision of a cable service, such as public, educational and government ("PEG") access or customer service obligations. Indeed, section 624(b)(1) of the Cable Act (barring the establishment of "requirements for . . . information services") arguably prohibits such a result, whether as part of a request for proposals for a new franchise or a renewal proposal. The imposition of such requirements could jeopardize Congress's goal of speeding the widest deployment of cable modem service by singling out cable operators for special regulatory burdens and fees that are not imposed on other ISPs, including DBS operators and telephone companies.

Pursuant to sections 1.1206(b)(2) of the Commission's rules, an original and one copy of this letter are being filed with the Office of the Secretary. Copies of the letter are also being served on the Commission personnel indicated below.

Sincerely,



Daniel L. Brenner

cc: Chairman Michael K. Powell
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Commissioner Kevin J. Martin
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